

Chicago Journal of International Law

Volume 17 | Number 1

Article 6

7-1-2016

International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters

Shiva Jayaraman

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International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters

Shiva Jayaraman*

Abstract

In response to the growing number of foreign fighters joining international terrorist organizations such as ISIL, some States are proposing to revoke the nationality of suspected terrorists as part of their comprehensive counterterrorism strategies. While domestic legal protections surrounding the right to one's nationality will vary from state to state, there are certain international human rights treaties that might prove to be significant legal obstacles to States contemplating these plans. This Comment surveys the applicable international treaty law and analyzes the legality of these plans under the existing human rights regime. It examines important distinctions between the way in which the international law treats an individual with only one nationality and an individual with multiple nationalities. It also discusses the extent to which international law protects the nationality rights of close family members of suspected terrorists. The Comment explores some of the legal advantages and disadvantages of revoking the nationality of an individual as part of a state's counterterrorism strategy. It concludes that States should refrain from implementing these plans due to their questionable efficacy and ramifications on international law.

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* J.D. Candidate, 2017, The University of Chicago Law School. I would like to thank Professor Flores and the editors of the *Chicago Journal of International Law* for their assistance and helpful suggestions.

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I. INTRODUCTION

On August 19, 2014, the terrorist group known as the Islamic State of Iraq and the Levant (ISIL, also known as ISIS, IS, and Daesh),¹ which controls a wide swath of territory across Iraq and Syria, uploaded a video to YouTube.² The video began with a clip of President Obama announcing U.S. airstrikes against ISIL in Iraq and quickly cut to a shot of a masked ISIL fighter standing next to the captured journalist James Foley.³ Mr. Foley read a prepared statement to the camera—likely written by his abductors.⁴ At that point, the ISIL fighter, later identified as Muhammad Emwazi but known in the media as “Jihadi John,” criticized the airstrikes and threatened retaliation against the U.S. The ISIL captors then beheaded Mr. Foley.⁵

Not only did this video underscore ISIL’s sheer brutality and violence, it also demonstrated another frightening reality about the group—its ability to attract foreign-born fighters to the organization’s ranks. “Jihadi John” earned his moniker because he spoke with a British accent throughout the video.⁶ American and European intelligence services initially suspected that he was a U.K. national.⁷ It was later determined that Emwazi was, in fact, a Kuwaiti and U.K. dual citizen.⁸

While estimates vary, it is suspected that roughly thirty American and five hundred British fighters have joined ISIL.⁹ Moreover, there are known fighters from France, Germany, Australia, Turkey, Jordan, and many other countries.¹⁰

¹ This group is officially referred to as “ISIL” by the U.S. Department of State and the Obama Administration. It is called “ISIS” or “IS,” often interchangeably, by many in the media. I refer to the group as “ISIL” as this is the U.S. government’s preferred name for the group. This, however, is simply a matter of convention in this Comment and does not reflect any judgments on the part of the author.

² While most copies of the actual video have been removed from popular streaming websites such as YouTube, many major news outlets have summarized its content. See Chelsea J. Carter, *Video shows ISIS beheading U.S. journalist James Foley*, CNN (Aug. 20, 2014), <http://www.cnn.com/2014/08/19/world/meast/isis-james-foley/>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ I use the terms “national” and “citizen” interchangeably.

⁸ *Jihadi John' named as Mohammed Emwazi from London*, BBC (Feb. 26, 2015), <http://www.bbc.com/news/uk-31637090>.

⁹ See Jessica Stern & J.M. Berger, *ISIS and the Foreign-Fighter Phenomenon*, THE ATLANTIC (Mar. 8, 2015), <http://www.theatlantic.com/international/archive/2015/03/isis-and-the-foreign-fighter-problem/387166/>.

¹⁰ See, for example, Jomana Karadsheh et al., *How foreign fighters are swelling ISIS ranks in startling numbers*, CNN (Sept. 14, 2014), <http://www.cnn.com/2014/09/12/world/meast/isis-numbers/>.

These “foreign fighters” are tremendous security risks for their home countries. A foreign national or dual-national might leave his home country and join ISIL in Iraq or Syria. He may receive weapons and explosives training and become further radicalized. If he carries, for example, a U.K., U.S., or Australian passport, he could have a relatively easy time returning to his home country or others.¹¹ The risk is, once back home, he will engage in terrorist activity or recruiting on behalf of ISIL.

In response to this security threat, several countries are considering plans that would strip suspected terrorists of their nationalities.¹² Denationalization programs would make it easier for States to keep suspected terrorists from returning to their home countries. These plans take different shapes and have a variety of consequences. Some States, for example, propose to revoke the nationality of suspected terrorists if they are dual-nationals, thus leaving them with another nationality.¹³ Other States are contemplating plans to render suspected terrorists stateless by depriving them of their sole nationality.¹⁴ One state is even considering revoking the nationality of persons associated with that specific individual, such as close relatives, including spouses and children.¹⁵ Of course, not all States are proposing to resort to such measures—the status quo in most States

¹¹ Daniel Byman & Jeremy Shapiro, *Be Afraid. Be A Little Afraid: The Threat of Terrorism from Western Foreign Fighters in Syria and Iraq*, THE BROOKINGS INSTITUTION: FOREIGN POLICY AT BROOKINGS (Nov. 2014), at 2.

¹² See, for example, *Fact check: How does Australia's plan to strip foreign rights of citizenship compare to other nations?*, ABC NEWS (June 11, 2015, 1:26 AM), <http://www.abc.net.au/news/2015-06-11/foreign-fighters-citizenship-around-the-world/6498920>; Hayes Brown, *The Hidden Dangers of Ted Cruz's New Anti-ISIL Bill*, THINK PROGRESS (Sept. 8, 2014, 3:02 PM), <http://thinkprogress.org/world/2014/09/08/3564312/the-hidden-dangers-of-ted-cruzs-new-anti-isis-bill/>; Gianluca Mezzofiore, *Norway 'to Make Citizens Fighting for Isis Stateless'*, IB TIMES (Aug. 27, 2014), <http://www.ibtimes.co.uk/norway-make-citizens-fighting-isis-stateless-1462776>; *Countries pass restrictions to prevent fighting with militants abroad*, CIRCA (May 19, 2015, 2:28 AM), <http://circanews.com/news/laws-against-joining-extremists>.

¹³ See, for example, Legislative Summary of Bill C-24: An Act to amend the Citizenship Act and to make consequential amendments to other Acts, at 17 PARLIAMENT OF CANADA, http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c24&Parl=41&Ses=2 (last updated Jul. 8, 2014).

¹⁴ See, for example, Melanie Gower, *Deprivation of British citizenship and withdrawal of passport facilities*, LIBRARY OF THE HOUSE OF COMMONS: HOME AFFAIRS SECTION (Jan. 30, 2015), <http://www.parliament.uk/briefing-papers/sn06820.pdf>.

¹⁵ Shalailah Medhora, *Children may lose Australian citizenship under proposed legislation*, THE GUARDIAN (June 11, 2015 11:36 PM), <http://www.theguardian.com/australia-news/2015/jun/24/children-may-lose-australian-citizenship-under-proposed-legislation>.

involves arresting suspected terrorists under applicable domestic antiterrorism laws before departure or upon arrival in their home state.¹⁶

Significant legal obstacles might prevent States from fully implementing proposed plans to strip suspected terrorists and their families of citizenship. There are, of course, a host of domestic legal issues that will vary from country to country. At the same time, various international conventions aimed at reducing statelessness and guaranteeing one's nationality as a fundamental human right may prohibit denationalization as a tool of state counterterrorism policy. Existing international law on the subject will therefore pose a challenge to States that are attempting to revoke the nationality of suspected terrorists to curb potential security risks. For example, Article 15 of the Universal Declaration of Human Rights (UDHR) guarantees an individual the right to a nationality and prohibits States from arbitrarily revoking it.¹⁷ Subsequent treaties also address the issue of statelessness. The 1961 Convention on the Reduction of Statelessness (1961 Convention), for example, prohibits a state from revoking the nationality of an individual if doing so would render that person stateless.¹⁸ There are, however, exceptions if the individual acts "in a manner seriously prejudicial to the vital interests of the State."¹⁹ This Comment will analyze the plans of States to strip suspected terrorists of their citizenship in light of this body of international law.

The Comment will suggest that while there is no ban, *per se*, on stripping a dual-national of one of his nationalities, international law prohibits "arbitrary" revocations of nationality.²⁰ While the scope of this protection is unclear, any substantive rights created by the prohibition of "arbitrary" revocations would pose significant legal issues for countries implementing these plans. Moreover, there are related issues regarding a potential "race" among States to denationalize an individual and supranational privileges stemming from citizenship.

In the case of a person with only one nationality, the international legal regime is much stricter and prohibits the revocation of citizenship unless certain exceptions to the 1961 Convention are satisfied. The current human rights regime likely prohibits States from revoking the nationality of a family member or friend of a suspected terrorist unless international law provides an independent basis for revoking their citizenship.

¹⁶ See, for example, Adam Goldman et al., *The Islamic State's suspected inroads into America*, THE WASHINGTON POST (Sept. 8, 2015), <http://www.washingtonpost.com/graphics/national/isis-suspects/>.

¹⁷ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 15, U.N. Doc. A/RES/217(III), (Dec. 10, 1948) [hereinafter UDHR].

¹⁸ Convention on the Reduction of Statelessness, G.A. Res. 896 (IX), 989 U.N.T.S. 175 (entered into force Dec. 13 1975).

¹⁹ *Id.* at art. 8.

²⁰ UDHR, *supra* note 17, at art. 15.

This Comment ultimately suggests that the benefits of these plans, from a counterterrorism perspective, must be weighed against the potential legal and normative consequences. It argues that denationalization plans are detrimental to state interests and international law. Therefore, States should not allow such proposed policies to come to fruition.

Section II of this Comment briefly discusses the rise of ISIL, highlights some of the emerging security issues faced by States with respect to the group, and introduces the foreign fighter phenomenon. It also presents the various plans that different States have either proposed or are currently debating to address this problem. Section III outlines the international human rights regime surrounding the right to a nationality. Section IV analyzes the various plans of several States proposing to revoke the citizenship of suspected terrorists in light of existing international law. Section V addresses some of the normative aspects of these plans and other related legal issues.

II. BACKGROUND

A. The Rise of ISIL

ISIL is a Salafi²¹ jihadist group, primarily centered in Iraq and Syria, which emerged in 1999 under another name—Jama’at Tawhid wa al-Jihad²²—under the leadership of Abu Musab al-Zarqawi.²³ For many years, the group had existed as an al-Qaeda affiliate in the region.²⁴ Before 2003, the group was predominantly involved with training Salafi terrorists across the region.²⁵ The group, even in these

²¹ Salafism is a conservative reform movement within Sunni Islam that focuses on emulating the example and teachings of the Prophet Muhammed and his early followers. It requires a strict and literal interpretation of sharia law. For a discussion of Salafism and ISIL, see Joas Wagemakers, *Jihadi-Salafi views of the Islamic State*, THE WASHINGTON POST (Jan. 27, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/01/27/jihadi-salafi-views-of-the-islamic-state/>.

²² *What is 'Islamic State'?*, BBC (Oct. 8, 2015), <http://www.bbc.com/news/world-middle-east-29052144>. The name of the organization roughly translates to “The Organization of Monotheism and Jihad.”

²³ There was a mutual distrust between al-Zarqawi and Bin Laden in the early 2000s. While there was a “marriage of convenience” between Jama’at Tawhid wa al-Jihad and al-Qaeda, the groups had different backgrounds, goals, and leadership styles. See Aaron Y. Zelin, *Research Notes: The War between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement*, THE WASHINGTON INSTITUTE FOR NEAR EAST POLICY (June 2014), http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote_20_Zelin.pdf.

²⁴ *Id.*

²⁵ *Mapping Militant Organizations: The Islamic State*, STANFORD UNIVERSITY MAPPING MILITANTS PROJECT, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1> (last updated May 15, 2015).

early years, drew foreign fighters from Jordan, Syria, Pakistan, and Afghanistan, among other countries.²⁶ Following the U.S.-led invasion of Iraq, the group reorganized itself as an official al-Qaeda affiliate based in Iraq.²⁷ It was actively involved in an armed insurgency against the U.S.-led coalition and the Iraqi military.²⁸ During this period, the group was significantly weakened by U.S. counterinsurgency efforts and its rejection by many local Sunni tribesmen and al-Qaeda in Iraq (AQI), who felt that the group's tactics and measures were too extreme.²⁹ In 2006, the group reorganized under the name the Islamic State of Iraq (ISI).³⁰

At the onset of the Syrian Civil War in 2011, ISI, led by Ibrahim Awad Ibrahim al-Badri al-Samarrai,³¹ sent material support and delegates to various anti-government rebel groups. ISI supporters began actively fighting the Assad government in conjunction with al-Nusra, another al-Qaeda affiliate, and other rebels.³² In April 2013, ISI announced a merger with al-Nusra and also announced that ISI would thereafter be known as ISIL.³³ This merger between ISIL, al-Nusra, and al-Qaeda eventually failed after the leadership of both al-Nusra and al-Qaeda rejected the organization.³⁴ ISIL was formally cut off from al-Qaeda and al-Nusra in February 2014.³⁵ In the aftermath of the failed merger, the group continued its attacks against the Syrian government and certain rebel groups.³⁶

In 2014, ISIL initiated increasingly aggressive military operations in Iraq and drove Iraqi government forces out of key cities in the northern and western regions of the country.³⁷ Specifically, in January 2014, ISIL fighters pushed the Iraqi military out of Fallujah.³⁸ In March 2014, ISIL seized Mosul.³⁹ Currently, the

²⁶ *Id.*

²⁷ *What is 'Islamic State'?*, *supra* note 22.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Mapping Militant Organizations: The Islamic State*, *supra* note 25.

³¹ He is more commonly known by his nom de guerre, "Abu Bakr al-Baghdadi." *See id.*

³² *The State of the War Against ISIS*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/06/12/world/middleeast/the-iraq-isis-conflict-in-maps-photos-and-video.html> (last updated Oct. 22, 2015).

³³ *Id.*

³⁴ *See Zelin*, *supra* note 23.

³⁵ *See What is 'Islamic State'?*, *supra* note 22.

³⁶ *See Zelin*, *supra* note 23.

³⁷ *Id.*

³⁸ *See* Martin Chulov et al., *Iraq army capitulates to Isis militants in four cities*, THE GUARDIAN (June 11, 2014), <http://www.theguardian.com/world/2014/jun/11/mosul-isis-gunmen-middle-east-states>.

³⁹ *Id.*

group controls a wide swath of territory across Syria and Iraq.⁴⁰ In 2014, the Central Intelligence Agency estimated the group had a strength of between 20,000 to 31,000 fighters.⁴¹ Other projections, however, place the number much higher—the Russian military believes that ISIL can muster around 70,000 fighters,⁴² while the Syrian Observatory for Human Rights has estimated that in Syria alone, ISIL fighters number over 50,000.⁴³

The group is noted for its strategic use of social media to facilitate recruitment and convey its radical ideology to a broader and increasingly global audience.⁴⁴ Through social media, ISIL has been able to seek recruits from many countries throughout the Middle East, in addition to Western nations.⁴⁵ The online content often depicts the graphic and brutal atrocities committed by fighters against civilians, journalists, and Iraqi government forces.⁴⁶

ISIL is perpetrating numerous war crimes and crimes against humanity in the territory it has occupied. According to a recent report from the U.N. High Commissioner for Human Rights, there are mass attacks targeting certain ethnic and religious minorities, including “Yezidis, Christians, Turkmen, Sabea-Mandean, Kaka’e, Kurds and Shi’a.”⁴⁷ These attacks are arguably genocidal in nature, such as the massacre of the Yezidi community in Sinjar.⁴⁸ Moreover, ISIL

⁴⁰ *The State of the War Against ISIS*, *supra* note 32.

⁴¹ Jim Sciutto et al., *ISIS can ‘muster’ between 20,000 and 31,500 fighters, CIA says*, CNN (Sept. 12, 2014), <http://www.cnn.com/2014/09/11/world/meast/isis-syria-iraq/>.

⁴² *Islamic State formations comprise up to 70,000 gunmen — Chief of Russia’s General Staff*, TASS: RUSSIAN NEWS AGENCY (Dec. 10, 2014), <http://tass.ru/en/world/766237>.

⁴³ *Islamic State ‘has 50,000 fighters in Syria’*, AL JAZEERA (Aug. 19, 2014), <http://www.aljazeera.com/news/middleeast/2014/08/islamic-state-50000-fighters-syria-2014819184258421392.html>.

⁴⁴ See J.M. Berger & Jonathon Morgan, *The ISIS Twitter Census: Defining and describing the population of ISIS supporters on Twitter*, THE BROOKINGS INSTITUTION: THE BROOKINGS PROJECT ON U.S. RELATIONS WITH THE ISLAMIC WORLD (Mar. 2015); see also Mark Mazzetti & Michael R. Gordon, *ISIS Is Winning The Social Media War, U.S. Concludes*, N.Y. TIMES (June 12, 2015), <http://www.nytimes.com/2015/06/13/world/middleeast/isis-is-winning-message-war-us-concludes.html>.

⁴⁵ See Mazzetti & Gordon, *supra* note 44.

⁴⁶ See, for example, *id.*; Rod Nordland & Alissa J. Rubin, *Massacre Claim Shakes Iraq*, N.Y. TIMES (June 15, 2014), http://www.nytimes.com/2014/06/16/world/middleeast/iraq.html?_r=0.

⁴⁷ Office of the U.N. High Commissioner for Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, Human Rights Council, at 5, U.N. Doc. A/HRC/28/18, (Mar. 13, 2015).

⁴⁸ Mohammed A. Salih & Wladimir van Wilgenburg, *Iraqi Yazidis: ‘If we move they will kill us’*, AL JAZEERA (Aug. 5, 2014), <http://www.aljazeera.com/news/middleeast/2014/08/iraqi-yazidis-if-move-they-will-kill-us-20148513656188206.html>. In March 2016, Secretary of State John Kerry declared ISIL’s atrocities against Christians, Yazidis, and Shi’a to be a “genocide.” See Matthew

fighters are committing mass rape, forcing women into sexual slavery, and allowing and encouraging other acts of sexual violence by the group's fighters.⁴⁹ ISIL fighters are attacking religious and historical monuments and destroying and seizing civilian property.⁵⁰ The group is committing numerous war crimes, including summary executions of political opponents, forcible conversions, torture, child conscription, displacement of civilian populations, and slavery, among others.⁵¹

As of 2016, fighting remains fierce in the region and the future of the conflict is uncertain. While other radical terrorist groups have declared their allegiance to ISIL, including Nigeria's Boko Haram,⁵² U.S. airstrikes in the region have dealt heavy losses to ISIL.⁵³ Moreover, the Iraqi military and Kurdish forces have staged numerous counteroffensives to reclaim territory previously held by ISIL.⁵⁴ Russia has also pledged greater material support to the Assad government in Syria and is assisting the Syrian government in countering rebel groups, including ISIL.⁵⁵ Despite the increased military activity by major foreign powers, ISIL still retains a large number of fighters in Syria and Iraq and controls a significant amount of territory.⁵⁶ It is unclear how continued counterterrorism efforts by the U.S. and Iraq and greater foreign intervention in the region will impact ISIL.

Rosenberg, *Citing Atrocities, John Kerry Calls ISIS Actions Genocide*, N.Y. TIMES (Mar. 17, 2016), <http://www.nytimes.com/2016/03/18/world/middleeast/citing-atrocities-john-kerry-calls-isis-actions-genocide.html>.

⁴⁹ See Office of the U.N. High Commissioner for Human Rights, *supra* note 47.

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² ISIL 'accepts Boko Haram's pledge of allegiance', AL JAZEERA (Mar. 12, 2015 22:03 GMT), <http://www.aljazeera.com/news/2015/03/isil-accepts-boko-haram-pledge-allegiance-150312201038730.html>.

⁵³ Kathy Gilsinan, *Counting the ISIS Dead*, THE ATLANTIC (Oct. 15, 2015), <http://www.theatlantic.com/international/archive/2015/10/us-isis-fighters-killed/410599/>.

⁵⁴ See Karen Leigh & Matt Bradley, *Counteroffensive in Iraq to Push Back Islamic State Planned for 2015*, THE WALL STREET JOURNAL (Dec. 30, 2014 3:41 p.m. ET), <http://www.wsj.com/articles/counteroffensive-in-iraq-to-push-back-islamic-state-planned-for-2015-1419972094>.

⁵⁵ *Russia carries out first air strikes in Syria*, AL JAZEERA (Sept. 30, 2015 16:59 GMT), <http://www.aljazeera.com/news/2015/09/russian-carries-air-strikes-syria-150930133155190.html>.

⁵⁶ *Id.* ISIL also recently declared itself to be the "Islamic Caliphate." For a discussion of this declaration's implications, see Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, THE BROOKINGS INSTITUTION: THE BROOKINGS PROJECT ON U.S. RELATIONS WITH THE ISLAMIC WORLD, at 31–35 (Mar. 2015).

B. The Foreign Fighter Phenomenon

As previously discussed, ISIL has a long history of drawing upon foreign fighters. I define “foreign fighter” as an individual who possesses a nationality or nationalities that are not Syrian or Iraqi. Ever since the creation of Jama’at Tawhid wa al-Jihad, which itself had numerous fighters from across the Middle East, Central Asia, and South Asia, ISIL has had success in recruiting and retaining foreign fighters from across the world.⁵⁷ There are competing accounts as to why ISIL can do this effectively.⁵⁸ For example, one explanation attributes the high number of foreign fighters to the relatively porous border between Turkey and Syria, making it easier for foreign fighters to travel to Syria.⁵⁹

The International Centre for the Study of Radicalisation and Political Violence (ICSR) estimates that approximately 20,000 foreign fighters have joined ISIL.⁶⁰ According to the ICSR, this estimate surpasses the total number of foreign fighters that fought the Soviet Union alongside the Afghani *mujahedeen* during the Soviet war in Afghanistan from 1979 to 1989.⁶¹ ICSR estimates that some 4,000 of these fighters are from Western Europe and roughly 100 are from the U.S., 100 from Canada, and 100-250 from Australia.⁶² There are also 1,500-2,500 Saudi Arabian fighters, 1,500-3,000 Tunisians, 1,500 Moroccans, 1,500 Jordanians, 800 Lebanese, and 600 Turks.⁶³ Similar estimates have been reported by other organizations.⁶⁴

Not only are the raw numbers startling, but the relatively high number from Western Europe, the U.S., Canada, and Australia are particularly striking. This poses a very real security challenge for these States. One concern is that these

⁵⁷ Eric Schmitt & Somini Sengupta, *Thousands Enter Syria to Join ISIS Despite Global Efforts*, N.Y. TIMES (Sept. 26, 2015), http://www.nytimes.com/2015/09/27/world/middleeast/thousands-enter-syria-to-join-isis-despite-global-efforts.html?_r=0; *Mapping Militant Organizations: The Islamic State*, *supra* note 25.

⁵⁸ See Simon Cottee, *Pilgrims to the Islamic State*, THE ATLANTIC (July 24, 2015), <http://www.theatlantic.com/international/archive/2015/07/isis-foreign-fighters-political-pilgrims/399209/>; Jessica Stern & J.M. Berger, *supra* note 9.

⁵⁹ *Id.*

⁶⁰ Peter R. Neumann, *Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s*, INTERNATIONAL CENTRE FOR THE STUDY OF RADICALISATION AND POLITICAL VIOLENCE (Jan. 26, 2015), <http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/> [hereinafter ICSR].

⁶¹ *Id.*

⁶² *Id.*

⁶³ These numbers are “conflict totals,” which estimate the total number of foreign fighters that have joined ISIL. ICSR estimates that between 5 to 10% of these foreigners have already died and that 10 to 30% of these individuals have left the conflict. *See id.*

⁶⁴ *Id.*

foreign fighters hold the passport of their home country and generally have the right to return to their home state. A foreign fighter could conceivably travel to Iraq or Syria, join ISIL, receive weapons and explosives training, and then travel back to his home country. At home, he might recruit for ISIL or commit other acts of terrorism.⁶⁵

There is a concern that foreign fighters may travel to other countries with greater ease. Being a citizen of an E.U. Member State, for example, makes travel within the E.U. easier. A U.K. intelligence agency must not only monitor an individual's travel between the U.K. and Syria or Iraq, but also between countries that are parties to the Schengen Agreement⁶⁶ and Syria and Iraq.⁶⁷

C. Counterterrorism Responses

Given the large number of foreign fighters joining ISIL, States have adopted a variety of counterterrorism responses. While U.S. airstrikes in Syria have targeted ISIL foreign fighters,⁶⁸ domestically, law enforcement and intelligence services are focused on trying to apprehend and charge suspects either before they leave to fight for ISIL or upon their reentry. In the U.S., for example, many individuals who were suspected of trying to leave the country to fight for ISIL in Syria were arrested and charged under domestic antiterrorism laws.⁶⁹ Some States, such as France, are using court orders to prevent suspected ISIL sympathizers from leaving the country.⁷⁰ Though challenging, others have focused on monitoring suspected ISIL fighters if they are not immediately arrested.⁷¹

Numerous States, however, are trying to prevent foreign fighters from even reentering their home countries as part of their counterterrorism strategy. The German government, for example, proposed revoking the passports of foreign

⁶⁵ See Byman & Shapiro, *supra* note 11, at 7–8.

⁶⁶ See, for example, *Paris attacks cast doubt on future of Schengen Area*, AL JAZEERA (Nov. 23, 2015, 12:29 GMT), <http://www.aljazeera.com/news/2015/11/paris-attacks-cast-doubt-future-schengen-area-151123095537274.html>.

⁶⁷ Byman & Shapiro, *supra* note 11, at 7–8.

⁶⁸ Greg Botelho et al., *U.S. 'reasonably certain' drone strikes killed ISIS mouthpiece 'Jihadi John'*, CNN (Nov. 14, 2015 9:24 EDT), <http://www.cnn.com/2015/11/13/middleeast/jihadi-john-airstrike-target/>.

⁶⁹ Goldman et al., *supra* note 16.

⁷⁰ See, for example, Stacy Meichtry, *France Steps Up Efforts to Stop Syria-Bound Fighters*, THE WALL STREET JOURNAL (July 9, 2014 9:47 a.m. ET), <http://www.wsj.com/articles/france-plans-travel-ban-for-syria-bound-fighters-1404913652>; Somini Sengupta, *Nations Trying to Stop Their Citizens From Going to Middle East to Fight for ISIS*, N.Y. TIMES (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/world/middleeast/isis-recruits-prompt-laws-against-foreign-fighters.html>.

⁷¹ See, for example, Michael S. Schmidt, *U.S. Investigators Struggle to Track Homegrown ISIS Suspects*, N.Y. TIMES (Nov. 19, 2015), http://www.nytimes.com/2015/11/20/us/us-investigators-struggle-to-track-homegrown-isis-suspects.html?_r=0.

fighters to make international travel more difficult.⁷² States like the U.K. and Canada have already implemented new citizenship laws that allow their governments to revoke the citizenship of dual-nationals who are suspected ISIL foreign fighters.⁷³ Other States, such as Australia and Norway, are contemplating plans to strip the citizenship of ISIL foreign fighters even if doing so would render individuals stateless.⁷⁴ Australia has even proposed revoking the nationality of close family members of suspected fighters, such as their children.⁷⁵

Instituting these plans will implicate significant international legal issues. An important tenet in international human rights law concerns the right to return to one's home country.⁷⁶ Germany's plan to revoke passports of suspected ISIL fighters, for example, might be in violation of the state's obligations under the International Covenant on Civil and Political Rights (ICCPR).⁷⁷ Similarly, States contemplating revoking the nationality of ISIL foreign fighters might encounter international legal obstacles by virtue of various international human rights treaties to which they are party. The following Section will discuss the current international legal regime surrounding the right to nationality. It will broadly separate these plans into three categories: laws that might deprive a dual-national of one of his nationalities; plans to strip a suspected ISIL fighter of his sole nationality, rendering that person stateless; and plans to revoke the nationality of close family members of the suspected foreign fighter, such as his children.

III. THE EXISTING INTERNATIONAL LEGAL REGIME

The right to one's nationality is, in some respects, one of the most important aspects of the emerging field of international human rights law. Hannah Arendt observed that the most basic political and civil rights flow through one's citizenship.⁷⁸ Arendt drew a sharp distinction between human rights—universal rights that are supposedly possessed by an individual simply by virtue of being human—and civil rights.⁷⁹ An individual holds these latter rights by virtue of the fact that he belongs to a distinct political community that is willing to enforce

⁷² See Schmitt & Sengupta, *supra* note 57.

⁷³ *Id.*

⁷⁴ See Mezzofiore, *supra* note 12.

⁷⁵ See Medhora, *supra* note 15.

⁷⁶ See UDHR, *supra* note 17, at art. 13 (“Everyone has the right to leave any country, including his own, and to return to his country.”).

⁷⁷ International Covenant on Civil and Political Rights, art. 12, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

⁷⁸ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 277 (1951).

⁷⁹ *Id.* at 290–302.

those rights.⁸⁰ Statelessness effectively causes one to lose all rights other than those generally recognized in international law as basic human rights.⁸¹ States are generally unwilling to secure and protect the civil rights of refugees and the stateless.⁸² Noting that the state is ultimately the highest political entity in an anarchic international system, Arendt argued that States have little incentive to respect and enforce the human rights of the stateless and others when these rights conflict with the States' overall national interests.⁸³

Indeed, many States predicate numerous political, civil, economic, and social rights on citizenship. Therefore, to Arendt, possessing a nationality is akin to having the right to rights.⁸⁴ This begs the question: given the importance of nationality under Arendt's analytical framework, what is the state's power to grant or revoke nationality? Is it simply an aspect of traditional state sovereignty? Or have recent developments in international law narrowed the traditionally broad power of States in this arena?

A critical tenet of international law in the Westphalian system⁸⁵ is the principle of state sovereignty—the idea that States have the sole ability to regulate and manage their own domestic and international affairs, free from the interference of other States.⁸⁶ Nationality—and the conditions under which it is to be granted or revoked—was traditionally outside the sphere of international law so long as it did not interfere with the rights of other States.⁸⁷ The growth of the international human rights regime, and the willingness of States to be bound by human rights treaties, have changed this traditional understanding of nationality and the power of States to grant and revoke it.⁸⁸

In the aftermath of World War II and the emerging international human rights consciousness that flourished in the post-war era, numerous international conventions were enacted that created a right to nationality under international law. Several key instruments, including the UDHR, the 1961 Convention, and the

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *id.*

⁸⁵ For a discussion on the “Westphalian system” and changing conceptions of legal sovereignty, see Eric A. Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIPIAC L. REV. 23 (2004).

⁸⁶ See, generally, Jason Farr, *Point: The Westphalia Legacy and the Modern Nation-State*, 80 INT'L SOC. SCI. REV. 156 (2005).

⁸⁷ See Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 697–703 (2011).

⁸⁸ See Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law*, 19 MICH. J. INT'L L. 1141, 1143–48 (1997).

Convention on the Rights of the Child, among others, have codified this right. Consequently, these treaties have placed additional restrictions on States that seek to deprive an individual of his or her nationality.⁸⁹ The goal behind these instruments is to reduce the incidence of statelessness and promote the development of human rights across the globe. This Comment will proceed to examine several of the most important conventions that deal with nationality.

A. Universal Declaration of Human Rights

The UDHR was drafted and ratified after World War II and was one of the first major post-war instruments regarding individual human rights.⁹⁰ It was instrumental in defining the fundamental freedoms and human rights referenced in the U.N. Charter and is a constitutive document of the U.N. These rights apply to all persons, regardless of race, sex, religion, national origin, or citizenship status. The UDHR is frequently cited and discussed by governments, lawyers, constitutional courts, and many in the legal, policy, and academic communities. It is a profoundly important source of international human rights law. Some even argue that its provisions have the status of customary international law.⁹¹

Article 15 of the UDHR explicitly creates a right to nationality under international law.⁹² This Article was drafted in response to the massive denationalizations that occurred during World War II and in its aftermath.⁹³ Specifically, it states: “(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”⁹⁴ Article 15, like much of the UDHR, articulates a general principle of international law without elaborating upon the specific contours of the right to nationality. It states that every person is entitled to a nationality, but does not explicitly specify whether the state in which a person resides owes a duty, under international law, to provide that person with a nationality.⁹⁵

⁸⁹ Spiro, *supra* note 87, at 695–96.

⁹⁰ Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization*, 23 BROOK J. INT’L L. 689, 701–08 (1998).

⁹¹ Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 289–90 (1995).

⁹² UDHR, *supra* note 17, at art. 15.

⁹³ Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur, U.N. Doc. A/CN.4/50 (Feb. 21, 1952).

⁹⁴ UDHR, *supra* note 17, at art. 15.

⁹⁵ See, generally, ALISON KESBY, *THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW* (2012).

Section 2 of Article 15 prohibits States from depriving an individual of his nationality “arbitrarily.”⁹⁶ This seems to suggest that at least procedurally,⁹⁷ there must be some rationale for revocation or perhaps even judicial “due process” given to an individual before a state revokes his or her nationality. But there is a conflict within Article 15—Section 2 implicitly contemplates a situation in which a state may revoke the citizenship of an individual which might render an individual without a nationality.⁹⁸ Should he be unable to acquire another nationality, a violation of Section 1 would result. It is also unclear which state must provide this nationality to an individual.

The term “arbitrarily” might confer some substantive rights to individuals. In interpreting what constitutes “arbitrary” state action in the context of international law, existing authority suggests that “necessity, proportionality, and reasonableness are relevant to the inquiry.”⁹⁹ The U.N. Human Rights Committee (HCR) has stated, in discussing the ICCPR, that “the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances.”¹⁰⁰ The HCR has further noted that “the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but must be interpreted more broadly to include such elements as inappropriateness and injustice.”¹⁰¹ Though the HCR is providing guidance on the meaning of “arbitrary” in the ICCPR, this interpretation is useful in understanding what “arbitrary” means in the UDHR. The ICCPR was created to elaborate upon and implement the rights in the UDHR, and the HCR’s interpretation of key terms in the ICCPR is therefore valuable in construing the language of the UDHR.

International law also explicitly recognizes several legitimate grounds for the revocation of nationality, which include fraud in obtaining citizenship, acts of disloyalty, and prejudicial conduct toward the granting state.¹⁰² These valid reasons for the revocation of citizenship and the ban on “arbitrary” deprivations imply

⁹⁶ UDHR, *supra* note 17, at art. 15(2).

⁹⁷ Mirna Adjami & Julia Harrington, *The Scope and Content of Article 15 of the Universal Declaration of Human Rights*, 27 REFUGEE SURV. Q. 93, 101 (2008); *A. v. Australia*, Communication No. 560/1993, 9.2, 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997).

⁹⁸ UDHR, *supra* note 17, at art. 15(2).

⁹⁹ Adjami & Harrington, *supra* note 97, at 101.

¹⁰⁰ U.N. Human Rights Committee, General Comment No. 16, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, at art. 17, ¶ 4, U.N. Doc. HRI/GEN/1/Rev. I (July 29, 1994).

¹⁰¹ *See* Adjami & Harrington, *supra* note 97, at 101.

¹⁰² *See* Convention on the Reduction of Statelessness, *supra* note 18, at art. 8.

that nationality cannot be revoked for reasons not specifically provided for under customary international law or by relevant treaties. Other reasons for revocation, such as a state revoking an individual's nationality solely on the basis of his or her race or ethnicity, seem to be "arbitrary" and impermissible under the UDHR.¹⁰³ Article 2 explicitly prohibits discrimination on this basis, which is also echoed in Article 9 of the 1961 Convention.¹⁰⁴ Suppose, for example, racial discrimination is grounds for revoking an individual's nationality under domestic law in a particular state. Even if the state afforded adequate due process to an individual before stripping his nationality on account of his race, the substantive aspect of Article 15(2) would prohibit such a revocation as "arbitrary" state action.¹⁰⁵

Thus, whether Article 15(2) creates a procedural safeguard and simply defers to underlying domestic law or confers any substantive protections is important in the context of an international right to citizenship. If Article 15(2) provides a substantive right by permitting the revocation of citizenship only for reasons already recognized by existing international law, it will curtail state discretion over citizenship law. Such a substantive protection might prohibit state plans to strip suspected terrorists of their nationality. If, however, it is simply a procedural requirement, this could be more favorable to States that have set up tribunals or some other mechanism for the purpose of revoking citizenship. Even if Article 15(2) created a mere procedural safeguard, there is a question as to the efficacy and actual opportunity of an individual, who is abroad, to challenge this action before a domestic body.¹⁰⁶

B. 1961 Convention on the Reduction of Statelessness

The 1961 Convention is a major source of international law on citizenship and the rights of stateless peoples.¹⁰⁷ It was created to reduce the incidence of statelessness in the aftermath of World War II and further implement the broad

¹⁰³ See UDHR, *supra* note 17, art. 15(2); Convention on the Reduction of Statelessness, *supra* note 18, at art. 8.

¹⁰⁴ See Convention on the Reduction of Statelessness, *supra* note 18, at art. 9.

¹⁰⁵ UDHR, *supra* note 17, at art. 7 (prohibiting discrimination and guaranteeing equal protection of the law). If a state's justification for revocation was the individual's race, such a revocation would be "arbitrary" as it is a violation of this principle of international law that is found in the UDHR.

¹⁰⁶ See, for example, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). In this case, the plaintiff, who was the father of suspected terrorist Anwar Al-Aulaqi, sued the United States on the belief that the government had placed his son's name on a targeted killing list. While the case was dismissed for lack of third-party standing, the district court noted the novel underlying issue—could a person who is simultaneously evading capture by U.S. law enforcement avail himself of judicial process to vindicate his constitutional rights?

¹⁰⁷ Convention on the Reduction of Statelessness, *supra* note 18.

provisions of Article 15 of the UDHR.¹⁰⁸ It broadly codifies many existing principles of customary international law while adding some restrictions on the ability of States to strip the nationality of individuals. Under the 1961 Convention, States retain ultimate sovereignty over the decision to grant citizenship.¹⁰⁹ The Convention also creates numerous individual rights and restricts the ways in which States may revoke nationality.¹¹⁰ It also addresses other issues in nationality law, such as the acquisition of citizenship while aboard an aircraft or sea vessel, residency requirements, and the time in which an individual may assert his or her rights under the Convention.¹¹¹

Sixty-four countries have ratified the 1961 Convention.¹¹² Of the countries discussed in this Comment, the U.S. has neither signed the treaty, nor ratified it.¹¹³ France has signed it, but is yet to formally ratify.¹¹⁴ Australia, Canada, the U.K., Norway, and Germany are all States Party to the Convention.¹¹⁵ Several States that are signatories have made declarations and/or reservations upon accession.¹¹⁶

Certain provisions of the 1961 Convention expressly prohibit a contracting state from stripping an individual of his citizenship if doing so would render him stateless. Specifically, Article 6 states that if a law causes a child or spouse to lose his nationality by virtue of a parent or spouse losing his nationality, such a loss is conditional upon that individual acquiring another nationality.¹¹⁷ Article 7 says that laws allowing the renunciation of one's citizenship do not actually result in the loss of one's nationality until the nationality of another state has been acquired by that individual.¹¹⁸

Article 8, however, is most relevant to this Comment. It contains certain exceptions to the protections of the Convention in the instance of fraud, disloyalty, or prejudicial conduct towards the state where an individual holds his nationality.¹¹⁹ If an individual acquires his nationality through fraud, then a state

¹⁰⁸ Jay Milbrandt, *Stateless*, 20 CARDOZO J. INT'L & COMP. L. 75, 87–89 (2011).

¹⁰⁹ See KESBY, *supra* note 9595, at 49–50.

¹¹⁰ *Id.* at 49.

¹¹¹ Convention on the Reduction of Statelessness, *supra* note 18, at art. 3.

¹¹² United Nations Treaty Center – Parties to the 1961 Convention on the Reduction of Statelessness, UNITED NATIONS TREATY CENTER (Oct. 29, 2015), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Convention on the Reduction of Statelessness, *supra* note 18, art. 6.

¹¹⁸ *Id.* at art. 7.

¹¹⁹ *Id.* at art. 8.

may revoke his citizenship whether or not doing so would render him stateless. Moreover, if at the time of signing, a state announced its intention to retain laws that would strip the nationality of those who commit acts prejudicial to “vital national interests” or swear allegiance to a foreign state, these laws remain valid.¹²⁰ There must, however, be an opportunity for the individual to present a defense at a fair hearing.¹²¹

The Office of the U.N. High Commissioner for Refugees (UNHCR) issued a report interpreting key sections of Article 8.¹²² Most notably, it provided guidance on the meaning of Article 8(3)(a)(ii), which says that notwithstanding the protections of Article 8(1), an individual may be stripped of his nationality such that he becomes stateless if he “has conducted himself in a manner seriously prejudicial to the vital interests of the State.”¹²³ The report suggests that this is an extremely high threshold that must “threaten the foundations and organizations of the State,” and not merely implicate “national interests.”¹²⁴ It declares that ordinary criminal activity does not rise to the level of “vital national interests” covered by the Article.¹²⁵ Rather, for a state to invoke Article 8, a more serious crime must be at issue which is highly prejudicial towards the state—this includes espionage, treason, or a violation of the duty of loyalty owed to one’s state.¹²⁶ Interestingly, the report states that “depending on their interpretation in domestic law—‘terrorist acts’ may be considered to fall within the scope of this paragraph.”¹²⁷ This phrasing, however, suggests that certain terrorist actions may not fall within the scope of Article 8. Given the language of the exception, a court might have to consider whether terrorism committed abroad sufficiently implicates the “vital interests” of the state.

¹²⁰ *Id.*

¹²¹ *Id.* at art. 8 (“A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this Article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.”).

¹²² U.N. High Commissioner for Refugees, Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (“Tunis Conclusions”) (Mar. 2014), available at <http://www.refworld.org/docid/533a754b4.html>.

¹²³ Convention on the Reduction of Statelessness, *supra* note 18, at art. 8.

¹²⁴ U.N. High Commissioner for Refugees, *supra* note 122.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

C. Other Sources of International Treaty Law

The right to nationality is also discussed in the Convention on the Rights of the Child (CRC),¹²⁸ the Convention on the Elimination of Discrimination Against Women (CEDAW),¹²⁹ and the Convention on the Nationality of Married Women (CNMW).¹³⁰ These conventions afford children and women certain enhanced protections under international law. They are relevant to this Comment as some States are contemplating plans to strip not only a suspected male terrorist of his nationality, but potentially his spouse or children as well.¹³¹

The CRC sets out various, political, economic, social, cultural, and health rights of children.¹³² Article 7 of this Convention makes nationality a fundamental right of the child, stating that the “child . . . shall have the right . . . to acquire a nationality.”¹³³ Article 8 imposes an obligation on the States Party to protect a child’s right to his or her identity, including nationality.¹³⁴ While this Convention does not further define the scope of this obligation, the treaty was created with the intent of strengthening legal protections for children under international law. Therefore, in light of the Vienna Convention on the Law of Treaties (Vienna Convention), we must construe these protections broadly to protect the interests of children in keeping with the Convention’s “object and purpose.”¹³⁵

CEDAW and the CNMW were adopted in 1979 and 1957, respectively.¹³⁶ These treaties were created to end sex discrimination and improve the conditions of women. With respect to citizenship rights, Article 9 of CEDAW grants women rights equal to those of men in acquiring, maintaining, or changing their

¹²⁸ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc A/RES/44/49 (1989) (entered into force Sept. 2, 1990).

¹²⁹ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46 at 193, U.N. Doc. A/RES/34/36 (1980) (entered into force Sept. 3, 1981), 12249 U.N.T.S. 13.

¹³⁰ Convention on the Nationality of Married Women, G.A. Res. 1040 (XI), 309 U.N.T.S. 65 (entered into force Aug. 11, 1958).

¹³¹ See Medhora, *supra* note 15.

¹³² Convention on the Rights of the Child, *supra* note 128.

¹³³ *Id.* at art. 7.

¹³⁴ *Id.* at art. 8.

¹³⁵ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 31 [hereinafter Vienna Convention].

¹³⁶ See *United Nations Treaty Center – Parties to the Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY CENTER (Oct. 29, 2015), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec; *United Nations Treaty Center – Parties to the Convention on the Nationality of Married Women*, United Nations Treaty Center (Oct. 29, 2015), https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVI-2&chapter=16&Temp=mtdsg3&lang=en.

nationality.¹³⁷ Article 9 also grants them equal rights to their children with respect to nationality.¹³⁸ CEDAW, along with the CNMW, also prohibits women from losing their nationality because of a change in their spouse's status¹³⁹ or nationality.¹⁴⁰

Interestingly, these same protections are not explicitly available to men. There have been known female ISIL foreign fighters.¹⁴¹ Their husbands will be unable to invoke these protections which forbid changes to their nationality based on a change to their wives' status. At the same time, taking into account the general principle of equality articulated by these treaties and their object and purpose, there is a strong argument that a male spouse of a suspected ISIL foreign fighter could invoke similar protections under these treaties.¹⁴² Similarly, CEDAW gives a woman equal nationality rights to her children.¹⁴³ If one was to interpret the nationality rights in the CRC broadly and in a way that prohibits a state from revoking a child's nationality, reading these two conventions together might yield a situation where women foreign fighters are afforded the same protections under international law.

Other sources of treaty law also govern the right to one's nationality, including the European Convention on Nationality,¹⁴⁴ which states that "A) everyone has the right to a nationality; B) statelessness shall be avoided; [and] C) no one shall be arbitrarily deprived of his or her nationality." This language closely tracks the 1961 Convention.¹⁴⁵

¹³⁷ Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 129, at art. 9.

¹³⁸ *Id.*

¹³⁹ This will be particularly important as it effectively bars a signatory state from revoking a woman's nationality simply because her husband's nationality was revoked pursuant to domestic law. *See infra*, Section IV.C.

¹⁴⁰ Convention on the Nationality of Married Women, *supra* note 130, at art. 2.

¹⁴¹ *See, for example, Schoolgirl jihadis: the female Islamists leaving home to join Isis fighters*, THE GUARDIAN (Sept. 24, 2014, 15:52 EDT), <http://www.theguardian.com/world/2014/sep/29/schoolgirl-jihadis-female-islamists-leaving-home-join-isis-iraq-syria>.

¹⁴² *See* Vienna Convention on the Law of Treaties, *supra* note 135, at art. 31.

¹⁴³ Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 129, at art. 9.

¹⁴⁴ European Convention on Nationality art. 4, March 1, 2000, E.T.S. 166.

¹⁴⁵ *See generally* Gerard-René de Groot & Maarten Peter Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, CEPS PAPER IN LIBERTY AND SECURITY IN EUROPE (Dec. 2014), <http://www.ceps.eu/publications/comparative-analysis-regulations-involuntary-loss-nationality-european-union>.

IV. LEGAL OBSTACLES TO IMPLEMENTATION UNDER INTERNATIONAL LAW

The timing of proposals to revoke the nationality of suspected terrorists overlaps with the U.N. High Commissioner for Refugees' effort to end statelessness by 2024.¹⁴⁶ Moreover, in the wake of the devastating attacks in Paris, San Bernardino, Beirut, and others in 2015, many in the international community are paying close attention to the counterterrorism efforts against ISIL. Russia, the U.S., and France have increased military operations in Syria in response to the aforementioned attacks.¹⁴⁷ Increasingly, political discourse in many Western nations has been concentrating on topics such as immigration, domestic security, and the potential security implications of ISIL foreign fighters returning to their home countries.¹⁴⁸

This Comment divides the denationalization plans into three categories: plans to revoke the nationality of dual citizens, plans to revoke the nationality of individuals with only one citizenship, and plans to revoke the nationality of associates of suspected foreign fighters. Section IV.A. argues that while there is no outright ban on revoking the nationality of dual nationals, there are, at the very least, procedural obligations that States must carefully consider. Section IV.B. suggests that international law permits States to deprive individuals of their sole nationality, so long as the requirements of the 1961 Convention are satisfied. Finally, Section IV.C. contends that States may not revoke the citizenship of associates of foreign fighters unless there is an independent basis for doing so under international law.

A. Proposals to Revoke the Nationality of Dual Citizens

As previously discussed, some States have already passed legislation authorizing the government to revoke the nationality of dual citizens. Canada, for example, recently enacted Bill C-24.¹⁴⁹ Under this law, a dual citizen's Canadian citizenship could be revoked if he is convicted of espionage, terrorism, or a similar

¹⁴⁶ UNHCR – The Campaign to end Statelessness, UNHCR, <http://www.unhcr.org/pages/53174c306.html> (last visited Oct. 29, 2015).

¹⁴⁷ Tom Bowman, U.S., French, Russian Airstrikes Continue To Attack ISIS Targets In Syria, NPR (Nov. 18, 2015), <http://www.npr.org/2015/11/18/456541230/u-s-french-russian-airstrikes-continue-to-attack-isis-targets-in-syria>.

¹⁴⁸ See, for example, Angela Charlton, *From 'welcome' to 'enough' – Europe's migrant view shifts*, ASSOCIATED PRESS (Mar. 13, 2016, 9:24 EDT), <http://bigstory.ap.org/article/63891f38c34e49bcbff526fa3b5a5926/welcome-enough-europes-migrant-view-shifts>; *Why is EU struggling with migrants and asylum?*, BBC (Mar. 3, 2016), <http://www.bbc.com/news/world-europe-24583286>.

¹⁴⁹ *Bill C-24 (Historical): Strengthening Canadian Citizenship Act*, OPENPARLIAMENT, <https://openparliament.ca/bills/41-2/C-24/>.

offense.¹⁵⁰ Moreover, if he is convicted of a similar foreign equivalent and sentenced to a minimum of five years in prison, the government, at its discretion, may revoke his nationality.¹⁵¹ The ultimate decision as to whether nationality will be revoked rests with the Minister of Citizenship and Immigration or his delegate instead of an immigration judge.¹⁵² This has alarmed human rights advocates and lawyers in Canada who argue that Bill C-24 violates due process.¹⁵³ Moreover, many argue that a foreign equivalent of terrorism is defined too broadly—in some States, terrorism is often a trumped up charge used to jail political opponents of the regime.¹⁵⁴ A recent publication of the Canadian Bar Association made reference to the fact that Nelson Mandela was convicted of an offense in South Africa, which could be considered an equivalent to a Canadian terrorism offense punishable under this new citizenship law.¹⁵⁵

In the aftermath of the 2006 London bombings, the U.K. enacted legislation which allows it to strip the citizenship of dual citizens.¹⁵⁶ These laws were amended in 2014 to allow the government to withdraw the citizenship of U.K. nationals with only one nationality.¹⁵⁷ If the Home Secretary finds that an individual committed acts of terrorism or espionage, then he may revoke that person's citizenship without a hearing.¹⁵⁸ The suspect has slightly under a month to contest this finding before a special immigration judge.¹⁵⁹

1. Arguments in support of these plans.

Several legal arguments support the position that States may revoke the citizenship of dual nationals. First, the UDHR does not elaborate on the legal obligations of state with respect to preserving the nationality of its citizens. It also contemplates situations in which States may revoke nationality. Given the lack of clarity in this area of international law and the fact that nationality has traditionally

¹⁵⁰ *Bill C-24, Strengthening Canadian Citizenship Act*, CANADIAN BAR ASSOCIATION: NATIONAL IMMIGRATION LAW SECTION, 4, <https://www.cba.org/CBA/submissions/pdf/14-22-eng.pdf>.

¹⁵¹ *Id.* at 16.

¹⁵² *Id.* at 22.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 21–22.

¹⁵⁵ *Id.*

¹⁵⁶ Katrin Bennhold, *Britain Expands Power to Strip Citizenship From Terrorism Suspects*, N.Y. TIMES (May 14, 2014), http://www.nytimes.com/2014/05/15/world/europe/britain-broadens-power-to-strip-terrorism-suspects-of-citizenship.html?_r=0.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

been an area where deference is given to States, these denationalization policies are legal under international law. This Section will further discuss these arguments.

While Article 15 of the UDHR makes nationality a right and prohibits its arbitrary revocation, it does not further elaborate on the status of dual nationals under international law.¹⁶⁰ Article 15 does not explicitly require States to grant or protect citizenship in any particular way. In fact, Article 15(2) of the UDHR implicitly contemplates situations in which a state might revoke an individual's nationality, as it prohibits only arbitrary revocations as opposed to all revocations.¹⁶¹ Additionally, the UDHR says nothing about an individual having a right to all of his nationalities, nor does it explicitly elaborate on what it means to have one's nationality "arbitrarily" revoked. The UDHR does not suggest which state, if any, must provide a nationality to an individual or afford him the right to retain his current citizenship. Instead, the UDHR defers these decisions to the States Party. "Arbitrary" does not necessarily mean that States must afford due process to an individual—rather, it arguably means that some rationale or reason must be proffered by the government in making the decision to revoke an individual's nationality.¹⁶²

The 1961 Convention also does not appear to prohibit stripping the citizenship of dual nationals. Article 8(1) explicitly covers individuals who are at risk of becoming stateless.¹⁶³ A dual national would have the nationality of another state and would therefore not be at risk of statelessness. Canada's Bill C-24, for example, clearly distinguishes between Canadians who possess only Canadian citizenship and those who do not.¹⁶⁴ A simple *expressio unius* reading of the 1961 Convention clearly excludes dual nationals from its protections. Therefore, any implied substantive protections in Article 15(2) of the UDHR derived through the

¹⁶⁰ UDHR, *supra* note 17, art. 15.

¹⁶¹ *Id.* art. 15(2).

¹⁶² See, for example, *Arbitrary*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures."). A plain reading of this term could simply mean a decision without regard to a certain set of facts or circumstances—in context, it could mean that a government makes a decision without looking at any particular fact or set of facts. Though "arbitrary" is not defined in the UDHR, the U.N. Office of the High Commissioner on Human Rights has taken this term in the context of "arbitrary" detentions to mean a decision stemming from a domestic judicial body in accordance with domestic law and existing international law on the subject to which the state is a party. This clearly cuts against the more narrow reading of "arbitrary." See U.N. Office of the High Commissioner on Human Rights, *Fact Sheet No. 26, The Working Group on Arbitrary Detention*, <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>.

¹⁶³ Convention on the Reduction of Statelessness, *supra* note 18, at art. 8(1).

¹⁶⁴ See *Bill C-24 (Historical): Strengthening Canadian Citizenship Act*, *supra* note 149.

explicit prohibitions in Article 8 of the 1961 Convention should not apply to dual citizens.

Since there are no particular sources of treaty or customary law *expressly* barring States from ever revoking the citizenship of an individual, domestic law might govern in the absence or uncertainty of international law in this area.¹⁶⁵ Because nationality law has been a part of States' traditional sphere of sovereignty, the vagueness of the UDHR with respect to dual nationals suggests that States have some latitude in this area. Moreover, many other provisions of the UDHR are ultimately up to States Party to enforce through domestic means. Here, States are interpreting their obligations under these treaties and crafting appropriate legislation. Canada has interpreted its obligations under the 1961 Convention and distinguished between dual nationals and individuals with only Canadian citizenship in its nationality law.¹⁶⁶ The U.K. acceded to the treaty with a specific reservation concerning the power to denationalize citizens in the event they act prejudicially towards vital national interests.¹⁶⁷

Finally, States are not engaging in the mass denationalizations that the UDHR and the 1961 Convention were created to address.¹⁶⁸ Instead, individual States, in response to a legitimate and overriding security interest, have introduced these citizenship laws as part of their counterterrorism strategies and have used them appropriately. Following the London attacks, for example, the U.K. government invoked this power intermittently and in response to grave terrorist attacks—forty-two times since 2006.¹⁶⁹

2. Arguments against these plans.

There are strong arguments against denationalization plans. Article 15, at the very least, provides individuals with a procedural right. Existing policies, from countries like the U.K. and Canada, are deficient insofar as they do not allow defendants an opportunity to meaningfully contest the revocation of their citizenship. Finally, an untenable result might occur—if two States attempt to denationalize an individual concurrently, there could be a “race” between the States to revoke, which will have negative implications on international politics and law.

¹⁶⁵ See *The Case of the S.S. “Lotus”* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (holding that the nature of international law is such that sovereign states may act freely so long as they are not in violation of treaties, *jus cogens* norms, or customary international law).

¹⁶⁶ *Bill C-24 (Historical): Strengthening Canadian Citizenship Act*, *supra* note 149.

¹⁶⁷ United Nations Treaty Center – Parties to the 1961 Convention on the Reduction of Statelessness, *supra* note 112.

¹⁶⁸ Milbrandt, *supra* note 108, at 87–89.

¹⁶⁹ Bennhold, *supra* note 156.

First, Article 15(2) of the UDHR clearly prohibits “arbitrary” revocations, which, at the very least, provides some procedural safeguards.¹⁷⁰ Some plans to revoke the citizenship of dual nationals, such as the Canadian law, would not have the issue adjudicated in court.¹⁷¹ Instead, the law defers the decision to an immigration official.¹⁷² This presents limited options for the affected individual to meaningfully contest this decision or present evidence refuting his alleged link to terrorist activity. The U.K. law works similarly, passing the decision to the Home Office.¹⁷³ A suspect has a limited time period to appeal the decision to a special immigration court.¹⁷⁴

From a procedural standpoint, these existing statutory schemes are fairly troubling. Numerous conventions, such as the ICCPR and the UDHR, guarantee the individual’s right to access domestic courts.¹⁷⁵ Here, a unilateral action taken by an executive agency with limited judicial review violates conventional understandings of due process. Instead of allowing a suspect to contest his or her status, introduce evidence asserting innocence, and meaningfully cross-examine the evidence introduced against him, a bureaucrat is making a unilateral decision. No insulated and independent body reviews the government’s factual determinations, nor is a defendant afforded the right to contest them. Given the political rhetoric in the U.S. and Western European nations surrounding immigrants, naturalized citizens, and Muslim minorities, there is an understandable concern about political actors making these decisions with little oversight. The argument against these plans relies on the contention that “arbitrary” should be read to require more than simply some rationale given by the government agency responsible for immigration—there must be some form of judicial due process afforded to a potential suspect. Such an interpretation of the term “arbitrary” is consistent across international human rights law and will better advance the object and purpose of these treaties.¹⁷⁶ Moreover, a hearing before an independent tribunal is more likely to limit potential abuses and the overbroad application of these laws while minimizing error if courts are holding governments accountable and allowing suspects to raise a defense.

Additionally, if international law prohibits a state from rendering a person stateless, there might be an odd effect between two denationalizing States. For example, Canada might wish to denationalize a dual citizen. If, however, the citizen’s other country of citizenship revokes his nationality before Canada acts,

¹⁷⁰ UDHR, *supra* note 17, art. 15(2).

¹⁷¹ *Bill C-24 (Historical): Strengthening Canadian Citizenship Act*, *supra* note 149.

¹⁷² *Id.*

¹⁷³ Bennhold, *supra* note 156.

¹⁷⁴ *Id.*

¹⁷⁵ *See, for example*, ICCPR, *supra* note 77, art. 14.

¹⁷⁶ *See, for example*, U.N. High Commissioner for Refugees, *supra* note 122.

his Canadian citizenship will be protected under C-24. Therefore, Canada and the other state are in a potential “race” to denationalize an individual. If both States are signatories to the 1961 Convention—both States would have obligations to prevent the individual from becoming stateless.

A “race” to denationalize is a bizarre and unworkable result. It is effectively a regime in which States have an incentive to quickly denationalize a suspect and race against other States to be first. This might lead to situations in which States quickly revoke citizenship of suspects and potentially making mistakes. Moreover, this could lead to tension between States which are trying to denationalize the same individual—a state’s counterintelligence apparatus has less incentive to share information with the other state if doing so would lead it to denationalize first. Moreover, a “race” to denationalize might lead to States simply ignoring or refusing to enforce provisions of the 1961 Convention—States may ignore their obligations under the treaty if they “lose” the “race” to another state.

3. Conclusion and related issues.

Ultimately, when balancing the legal arguments for and against these plans, it appears there is no per se ban on revoking the citizenship of dual citizens. The 1961 Convention’s protections extend only to a person who is at risk of statelessness. Moreover, there is a strong argument that a suspected ISIL foreign fighter, simply by virtue of declaring his allegiance to ISIL, meets an existing exception to the 1961 Convention if the revocation of his nationality were to render him stateless. Additionally, the UDHR implicitly recognizes that revocations of nationality may occur. The UDHR does not make it incumbent on any particular state to grant nationality to a particular individual. Finally, nationality law is an area where States have been afforded great deference as part of their traditional sphere of sovereignty.¹⁷⁷ Given the uncertainty of international law in this area, there is a compelling argument to defer to the security interests of States in implementing such plans.

At the same time, there is a right against “arbitrary” revocations, and there are troubling procedural issues with Canada’s and the U.K.’s laws. The lack of procedural rights does not appear to be fatal, however, as States can amend these laws to afford greater procedural safeguards and provide for additional review by an independent tribunal. At the same time, there is a question of an individual’s ability to actually contest his or her status even with procedural safeguards in place. If an individual is abroad, and his citizenship is under review, what is his actual ability to raise an adequate defense if he is not present in the home country and cannot respond to the summons or complaint? Without an opportunity to meaningfully contest the disposition of one’s citizenship, there might be a

¹⁷⁷ KESBY, *supra* note 95, at 49–50; Spiro, *supra* note 87, at 697–98.

violation of Article 15(2) of the UDHR.¹⁷⁸ States must consider this issue carefully when designing procedural protections for defendants.

B. Proposals to Render Individuals Stateless

Some States have enacted or are considering legislation revoking the nationality of suspected foreign fighters with only one nationality, rendering them stateless. Norway, for example, is contemplating a plan that would strip a suspected terrorist of his citizenship, regardless of whether this would leave him stateless.¹⁷⁹ This could be a potential “next step” for States that have already created plans to strip the citizenship of those who possess dual nationality. As previously discussed, after the 2006 London bombings, the U.K. passed legislation allowing the Home Office to revoke the U.K. nationality of dual citizens.¹⁸⁰ In 2014, this law was expanded to include individuals with only U.K. citizenship, leaving those people stateless.¹⁸¹

There is a host of new legal issues in the context of rendering an individual stateless. First, much of the aforementioned analysis under the UDHR will apply here. There is also a potential sovereignty issue—the expelling state is ostensibly “forcing” its national elsewhere, potentially violating the receiving state’s

¹⁷⁸ There is another legal issue with supranational privileges of citizenship. Given the fact that nationals of a E.U. Member State are also European citizens, is one’s European citizenship revocable? Suppose an individual is a dual Kuwaiti and U.K. citizen, like “Jihadi John.” If the U.K. beats Kuwait in the “race” to strip him of his citizenship, does this impermissibly implicate his rights as a citizen of the E.U.? This concern can be dismissed, however, as his citizenship within the E.U. flows through his British nationality and is severed when the U.K. terminates his citizenship. Moreover, substantive rights under the relevant European human rights treaties typically track the language of broader conventions, such as the European Convention on Nationality, the UDHR, and the 1961 Convention. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 20(1), 2008 O.J. C 115/47 (“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”). This suggests that E.U. citizenship is a direct consequence of national citizenship of a Member State. It does not replace, but simply complements, national citizenship. There has not been, however, a conclusive resolution of this legal question by the Court of Justice of the E.U. In *Rottmann v. Bayern*, the Court did not ultimately reach the question of whether petitioner Rottmann lost his E.U. citizenship when Germany denationalized him after he was found to have committed fraud in his application for citizenship. Since he lost his prior Austrian citizenship when he was naturalized as a German citizen, a revocation of his German citizenship would have left him stateless, and according to him, without his E.U. citizenship. Case C-135/08, *Rottmann v. Bayern*, 2010 E.C.R. I-01449.

¹⁷⁹ *See* Mezzofiore, *supra* note 12.

¹⁸⁰ *See* Bennhold, *supra* note 156.

¹⁸¹ *Id.*

sovereignty.¹⁸² Most critically, the protections of the 1961 Convention come into play here since the suspected foreign fighter would be left stateless.

Specifically, Article 8(1) of the 1961 Convention will govern here. This provision appears to disallow States from stripping suspected terrorists of their citizenship if doing so would leave them stateless.¹⁸³ But there are important qualifications and numerous unanswered questions established by the Article 8 exceptions. One must also look to any relevant declarations or reservations by the acceding state, which might limit the scope of its legal obligations under the Convention.¹⁸⁴

1. The Article 8 exceptions.

Article 8 has numerous exceptions to the Convention's general prohibition on denationalizations that would result in statelessness. Article 8(2) says that if an individual obtained his nationality by fraud, then a state may strip that individual of his citizenship whether or not doing so would render him stateless.¹⁸⁵ Article 8(3)(a)(ii) carves out another exception for an individual who has "conducted himself in a manner seriously prejudicial to the vital interests of the state."¹⁸⁶ Article 8(3)(b) says if one has given evidence of his determination to repudiate his allegiance with the contracting state, that is also sufficient for the revocation of citizenship, even if doing so would leave him stateless.¹⁸⁷

2. Acting against state interests.

These three provisions, however, require existing laws at the time of ratification that had denationalization as a potential penalty to have been declared by the signatory country. Analyzing the domestic laws of the country is therefore important to see if the Article 8 requirements were satisfied at the time of ratification. Current anti-terrorism laws may not have been in existence at the time that States ratified the Convention.¹⁸⁸ Therefore, States Party are violating the treaty if they created new antiterrorism laws, after their accession to the treaty, that allow for denationalization of foreign fighters. There may be, however, certain reservations that States declared at the time of accession. For example, the U.K.

¹⁸² See William Thomas Worster, *International Law and the Expulsion of Individuals With More Than One Nationality*, 14 UCLA J. INT'L L. & FOR. AFF. 423, 427 (2009).

¹⁸³ Convention on the Reduction of Statelessness, *supra* note 18, art. 8(1).

¹⁸⁴ See Vienna Convention on the Law of Treaties, *supra* note 135, art. 19.

¹⁸⁵ *Id.* at art. 8(2).

¹⁸⁶ *Id.* at art 8(3).

¹⁸⁷ *Id.*

¹⁸⁸ United Nations Treaty Center – Parties to the 1961 Convention on the Reduction of Statelessness, *supra* note 112.

only enacted the reforms to its nationality laws in 2014.¹⁸⁹ The country included a reservation when signing the 1961 Convention that stated that it could revoke the nationality of a U.K. national if he acted prejudicially toward national interests, regardless of the rules in Article 8(3).¹⁹⁰ This reservation limits the scope of the protections afforded to U.K. nationals under the treaty and allows the U.K. to denationalize under new authorizing laws if the individual has acted contrarily to vital national interests.¹⁹¹

The current standard in Article 8(3)(a)(ii) is, however, somewhat unclear—what does it mean to act “in a manner seriously prejudicial to the vital interests of the state”?¹⁹² One might think of domestic terrorism, for example, as seriously prejudicial to the vital interests of the state. Does this, however, cover acts of terrorism abroad? The U.N. has provided some guidance on this question—a memorandum from the UNHCR suggests this section creates a “very high threshold” and must “threaten the foundations and organizations of the State.”¹⁹³ The memorandum also specifically mentions that “terrorist acts” could fail to meet this standard, depending on the nature of those acts and the definition of terrorism under domestic law.¹⁹⁴

Moreover, the act must “threaten the foundations and organizations of the State.”¹⁹⁵ Would an act of terrorism, directed toward another country, satisfy this condition? Does any act in support of a group such as ISIL, given its intent to attack Western nations, constitute a threat to the “foundations and organizations of the state”? As previously discussed, this standard seems to require more than simply acting contrary to “state interests.”¹⁹⁶ Instead, the act must be contrary to “vital state interests.”¹⁹⁷ This affects the analysis. Does this mean that the level of one’s aid or assistance to a terrorist group is determinative of acting contrary to “vital state interests”? Or is any material aid or support to a terrorist organization a categorical violation of “vital state interests”? It seems likely that following the 2015 attacks in Paris, Beirut, San Bernardino, and others, joining or offering support to ISIL would constitute action that is highly prejudicial to national state interests. Even if a suspected foreign fighter joined ISIL and limited his activities

¹⁸⁹ See Bennhold, *supra* note 156.

¹⁹⁰ See United Nations Treaty Center – Parties to the 1961 Convention on the Reduction of Statelessness, *supra* note 112.

¹⁹¹ *Id.*

¹⁹² Convention on the Reduction of Statelessness, *supra* note 18, art. 8(3).

¹⁹³ U.N. High Commissioner for Refugees, *supra* note 122.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See U.N. High Commissioner for Refugees, *supra* note 122.

¹⁹⁷ *Id.*

to Syria and Iraq, such actions would still be contrary to state interests as defined in the 1961 Convention, as he is providing material support to a group that seeks continued attacks upon his home state.

3. Independent adjudication and due process concerns.

Moreover, Article 8 requires some due process before citizenship can be stripped. The Convention says that a court or an “independent body” must hold a hearing.¹⁹⁸ This lends itself to a whole host of interpretive questions. Does this mean a determination made by the executive or his agents? What does “independent” mean? Must this be at least a quasi-judicial body with members outside the state’s executive, military, intelligence, or defense circles?

Suppose this is taken to mean a hearing before a court or other independent administrative body—this would be a broader and more comprehensive protection than an “arbitrary” deprivation discussed in the UDHR, which does not explicitly require a hearing before a judicial body or independent tribunal. At the same time, one might wonder what sort of opportunity a suspect would have to meaningfully contest any such decision rendered by the state and avail himself of judicial process. On the other hand, what is to be done about the state’s security interest in promptly stripping the citizenship of a potential terrorist and preventing him from returning home—can a state reasonably be required to wait with pressing national security concerns? How do we balance these two interests under the Convention? Here, there is a similar concern to the application of Article 15 of the UDHR, and there are no easy answers to these questions.

C. Proposals to Revoke the Nationality of Individuals Closely Associated with Suspected Foreign Fighters

While no state has amended its nationality laws to denationalize individuals closely associated with suspected ISIL foreign fighters, Australia has proposed legislation to that effect.¹⁹⁹ This raises the question of whether States can denationalize an individual simply based on his association with a suspected foreign fighter. Much of the analysis from the preceding Sections will apply here, including the distinction between dual nationals and individuals possessing only one nationality.

If the individual is a dual national, one might argue that so long as the decision is not procedurally “arbitrary,” there is likely no per se ban on revoking this individual’s nationality. At the same time, however, if the term “arbitrary” conveys substantive protections to individuals, then the exceptions of the 1961

¹⁹⁸ Convention on the Reduction of Statelessness, *supra* note 18, art. 8(4).

¹⁹⁹ See Medhora, *supra* note 15.

Convention would apply.²⁰⁰ A state, therefore, could not revoke the nationality of the associate unless he met one of the exceptions listed in Article 8 of the 1961 Convention.²⁰¹ If a dual national child, for example, had no participation in his or her parent's alleged terrorism, then any revocation simply based on the child's kinship to the parent is "arbitrary."²⁰² Therefore, the question of whether Article 15(2) of the UDHR conveys any substantive protections to individuals also affects the analysis of whether States may denationalize associates of suspected ISIL foreign fighters.²⁰³

Moreover, given the stringent requirements of the 1961 Convention, if the state was planning on stripping the nationality of an associate with only one nationality, this would likely constitute a violation of international law under the 1961 Convention, unless that person met an existing exception.²⁰⁴ These protections apply to every person in a signatory country.

Additionally, there are special international conventions dealing with the rights of women and children. In the case of spouses, and women in particular, CEDAW and the CNMC protect the nationality of women.²⁰⁵ In particular, these conventions expressly establish parity in citizenship rights between women and men²⁰⁶ and prohibit changes to the spouse's citizenship based on changes to the husband's.²⁰⁷ In the case of children, Articles 7 and 8 of the CRC impose a duty on States to preserve the identity and nationality of children.²⁰⁸

In the case of women associates of foreign fighters, we can clearly see that international conventions on the rights of women prohibit a change in their nationality status based solely on a change in their husband's status. If, however, the alleged fighter was a woman, her husband may not receive the heightened protection from these conventions. However, given the object, purpose, and principle of equality behind these conventions, there is a strong argument that

²⁰⁰ Convention on the Reduction of Statelessness, *supra* note 18, art. 8.

²⁰¹ *See id.*

²⁰² UDHR, *supra* note 17, art. 15(2).

²⁰³ *Id.*

²⁰⁴ Convention on the Reduction of Statelessness, *supra* note 18, art. 8.

²⁰⁵ *See* Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 129; Convention on the Nationality of Married Women, *supra* note 130.

²⁰⁶ Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 129, art. 9.

²⁰⁷ Convention on the Nationality of Married Women, *supra* note 130, art. 2.

²⁰⁸ Convention on the Rights of the Child, *supra* note 128, art. 7–8.

they should be read to cover male spouses of suspected female foreign fighters as well.²⁰⁹

In the case of children, Articles 7 and 8 of the CRC are also vague with respect to the duties of States.²¹⁰ While the Convention does not prohibit States from revoking the nationality of children, the requirement that States must preserve and maintain the nationality of children arguably requires something greater than simply enjoining States from “arbitrarily” revoking nationality. The fact that this Convention elaborates on these rights after the UDHR suggests that it provides greater protection to children than what is articulated in Article 15 of the UDHR.²¹¹ While the actual scope of this obligation is unclear without further guidance, a responsibility to “preserve” the nationality of children might even be interpreted to mean that States cannot revoke the nationality of children.

Therefore, stripping the citizenship of family or friends who are not involved in the alleged terrorism is suspect and less likely to be legal under international law. Without an independent basis through which to revoke nationality, the protections in the UDHR, 1961 Convention, and other international conventions protect otherwise innocent individuals from denationalization of this type. Moreover, from a normative standpoint, there is something rather invidious and troubling about revoking the citizenship of a family member of a suspected ISIL foreign fighter if that person had nothing to do with the suspect’s terrorist activities.

V. POLICY CONSIDERATIONS AND RELATED LEGAL ISSUES: WHY STATES SHOULD NOT IMPLEMENT THESE PLANS

From a policy standpoint, is it actually desirable to create and execute plans to strip suspected terrorists and their family members of their citizenship? On the one hand, States have a strong interest in maintaining their sovereignty and protecting against security risks. Revoking the nationality of a suspected terrorist seems like a relatively easy and low cost method to prevent reentry. It avoids potentially thorny legal questions with respect to revoking passports or denying a citizen the right to reenter his or her home country, which might be prohibited under international law.²¹² Moreover, monitoring by security or intelligence

²⁰⁹ This is preferred interpretive method under the Vienna Convention. Vienna Convention on the Law of Treaties, *supra* note 135, art. 31.

²¹⁰ Convention on the Rights of the Child, *supra* note 128, art. 7–8.

²¹¹ UDHR, *supra* note 17, art. 15(2).

²¹² See, for example, *id.* at art. 13(2) (“Everyone has the right to leave any country, including his own, and to return to his country.”); ICCPR, *supra* note 77, art. 12 (“Everyone shall be free to leave any country, including his own No one shall be arbitrarily deprived of the right to enter his own country.”).

services might be costly or ineffective due to certain constitutional or other legal protections.²¹³ An individual might be suspected of being such a high risk that the state may not wish to hazard the danger of allowing him or her to reenter the country if the individual would not be arrested immediately. Moreover, if States revoked nationality, it might be easier for them to target a suspected terrorist in a drone strike or similar extra-judicial killing. This would allow States to circumvent any protections available to the suspected foreign fighter under domestic law which might prevent the targeted assassinations of nationals.²¹⁴

On the other hand, there are numerous issues with respect to the actual efficacy and legality of these plans. These concerns, and their related consequences for state security and international law, suggest that States should be very cautious before implementing these plans or should reject them entirely. The Comment will outline some of the major issues with implementing these plans and propose why it is not in the long-term interests of States, individuals, and the international community to allow these plans to come to fruition.

A. Ignoring the Underlying Problem

First, denationalizing effectively allows a state to simply “dump” one of its nationals into the conflict in which he or she is operating.²¹⁵ If the individual wishes to leave the conflict and is rendered stateless by one of these proposals, the denationalizing state forces that individual back to the terrorist group or into a position of breaking the laws of other States—it further disincentivizes him from renouncing his participation in a terrorist organization.²¹⁶ At the very least, it increases the individual’s cost of exiting the conflict by leaving him stateless. This is because that person might have no choice but to remain engaged with his

²¹³ See, for example, *The Civil Liberties Implications of Counterterrorism Policies: Full Chapter*, FREEDOM HOUSE, <https://freedomhouse.org/report/todays-american-how-free/civil-liberties-implications-counterterrorism-policies-full-chapter>.

²¹⁴ See, for example, Katrin Bennhold, *Britain Increasingly Invokes Power to Disown Its Citizens*, N.Y. TIMES (April 9, 2014), <http://www.nytimes.com/2014/04/10/world/europe/britains-power-to-disown-its-citizens-raises-questions.html>.

²¹⁵ See Worster, *supra* note 182, at 427.

²¹⁶ Other commentators have noted corollaries to this issue. For example, the former head of counterterrorism at MI6, the U.K.’s external intelligence agency, recently stated that foreign fighters who wish to renounce their involvement in foreign terrorist activity need “to know that there is a place for them back at home.” This is because ex-foreign fighters are better positioned to undermine the terrorist narrative and more concretely explain to potential recruits why joining ISIL is a bad decision. Mark Townsend et al., *Isis fighters must be allowed back into UK, says ex-MI6 chief*, THE GUARDIAN (Sept. 7, 2014), <http://www.theguardian.com/world/2014/sep/06/richard-barrett-mi6-isis-counter-terrorism>.

terrorist group or violate other laws by evading capture and illegally remaining in another state.²¹⁷

Moreover, the act of denationalizing and “dumping” a national arguably violates the sovereignty of States where denationalized terrorists are operating or to which they have fled.²¹⁸ If that individual was rendered stateless, he could not legally move across countries. If he resides illegally in another state, this infringes upon the national sovereignty and violates the law of the receiving state.²¹⁹ The receiving state can also no longer deport or otherwise remove the stateless person to another country without violating international law.²²⁰ Thus, the primary burden of dealing with a stateless terrorist is left mainly on the shoulders of the state in which that person is operating or located. Contrast this situation with a state that still claims a suspected fighter as one of its nationals and actively seeks to apprehend that person and bring him to justice, asserting universal or nationality jurisdiction and criminalizing his actions extraterritorially.²²¹

While denationalization might be a temporary security solution for an individual state, it does not address the broader issues regarding international terrorism. Specifically, simply denationalizing a suspected terrorist does nothing to actually bring that person to justice—instead, it simply allows a particular state to absolve itself of both legal and moral responsibility and jurisdiction over that person. Such an action does little to combat terrorist groups such as ISIL or impede their activities and recruitment. It might only marginally deter potential recruits, who are likely already contemplating lengthy criminal sentences under domestic law or the risk of injury or death if they provide material support to a terrorist organization.²²² If the denationalizing state does nothing to aid or assist the receiving state in combating terrorist groups, the strength of the terrorist group is not directly diminished. Denationalization of fighters by foreign States

²¹⁷ See also Charles Lister, *Returning Foreign Fighters: Criminalization or Reintegration?*, THE BROOKINGS DOHA CENTER: FOREIGN POLICY AT BROOKINGS (Aug. 2015), <http://www.brookings.edu/~media/research/files/papers/2015/08/13-foreign-fighters-lister/en-fighters-web.pdf>.

²¹⁸ Worster, *supra* note 182, at 427.

²¹⁹ See *id.*

²²⁰ *Id.*

²²¹ See Ben Saul, *Plan to strip citizenship is simplistic and dangerous*, AUSTRALIAN BROADCASTING CORPORATION (May 26, 2015), <http://www.abc.net.au/news/2015-05-27/saul-plan-to-strip-citizenship-is-simplistic-and-dangerous/6499710>.

²²² There is, however, also a strong argument that revoking an individual's citizenship is actually an unduly harsh punitive measure. In *Trop v. Dulles*, a plurality of the Supreme Court, led by Chief Justice Earl Warren, held that reducing someone to statelessness is “a form of punishment more primitive than torture” and that it would result in the “total destruction of the individual's status in organized society.” 356 U.S. 86, 101–02 (1958). Moreover, the Court went as far as saying that “civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.” *Id.*

will not yield a tangible benefit to the Iraqi or Syrian governments or others actively fighting ISIL. The underlying problem is thus simply punted to the international community and the States where these individuals are located.

B. Legal Obligations to Apprehend and Bring Suspected Terrorists to Justice and Related Legal and Ethical Concerns

Moreover, if the state has credible intelligence to suggest that its national is a terrorist, it has an obligation (potentially under international law) to pursue and apprehend that individual.²²³ Especially if the state criminalizes acts of terrorism extraterritorially, domestic law may impose a duty on the state to bring that person to justice.²²⁴ One would have to look to applicable domestic law on this subject. If, by denying reentry, it makes it more difficult for security services to apprehend a suspect, is it not neglecting these legal obligations?²²⁵

If a known terrorist actually wanted to reenter a country, it seems unlikely that revoking his nationality would actually serve as an impediment to repatriation. If such an individual was flagged as a suspected terrorist, presumably he would be stopped and detained by security forces at a border checkpoint. A rational individual, seeking to evade detection and capture, might plan to avoid such scrutiny by border or customs officials at official border crossings. He might, instead, attempt to illegally enter the state. Therefore, the potential risks that denationalization policies were created to address would not, in fact, curb the return of suspected foreign fighters who are persistent in seeking reentry to the former home country.

While some might argue that denationalization generally makes international travel more difficult, the legal issues associated with these plans seems comparable to the legal issues regarding the revocations of the passports of individuals and

²²³ For a discussion of the numerous international conventions, binding resolutions of the U.N. Security Council, and customary international law dealing with the obligations of States to apprehend and pursue terrorists, see U.N. OFFICE ON DRUGS AND CRIME, HANDBOOK ON CRIMINAL JUSTICE RESPONSES TO TERRORISM, at 9–15, U.N. Sales No. E.09.IV.2 (2009).

²²⁴ Under international law, States are allowed to assert extraterritorial jurisdiction under the theory of universal jurisdiction over a category of crimes that are of common concern to the international community. Piracy, genocide, and war crimes have often fallen into this category, and there is a strong argument that terrorism does as well. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 404 (“A state has jurisdiction to define and prescribe punishment for certain Offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.”). States may also apply their criminal law extraterritorially in other circumstances. The U.S., for example, asserts extraterritorial jurisdiction in certain antiterrorism laws. See, for example, 18 U.S.C. § 2332(b).

²²⁵ See also Saul, *supra* note 221.

denying nationals the right to travel freely under international law.²²⁶ Thus, a more narrowly tailored approach might be preferable here from a purely legal standpoint, for the aforementioned legal issues with denationalizations.²²⁷

Using denationalization as a punitive or deterrent measure, in the absence of actually apprehending a suspected terrorist, is also a poor substitute to convicting that person of a substantive terrorism offense. The spate of denationalizations carried out by the U.K., for example, has done little in stemming the flow of foreign fighters from that country to join ISIL.²²⁸ States, instead, should be more concerned with locating and jailing suspects for these crimes.

Moreover, revoking citizenship to facilitate extrajudicial killing is worrisome under international human rights law. While the U.S., for example, has increased its drone operations and targeted assassinations of key al-Qaeda and ISIL fighters,²²⁹ the usage of drones and targeted killings is still relatively murky under existing international law.²³⁰ Therefore, efforts to use denationalization as a tool to further extra-judicial killings is potentially problematic under international law. There are also a host of ethical issues with extrajudicial killings, which scholars have discussed at length in the existing literature.²³¹

C. Possibility of Error and Monitoring Capabilities

Finally, the possibility of error exists—a state might mistakenly revoke the citizenship of an individual who is actually not a terrorist. Revoking the citizenship of that individual could have severe, immediate consequences, making it difficult for him to challenge this decision in the future. Suppose the U.K. denationalizes a suspected terrorist who is actually a civilian. If that person is later detained by the security forces of the country in which he is located, he would also be deprived

²²⁶ See *supra* note 212.

²²⁷ In the U.S., for example, the Supreme Court has recognized a right to international and interstate travel. See *Haig v. Agee*, 453 U.S. 280, 306 (1981); *Shapiro v. Thompson*, 394 U.S. 618, 638 n.21 (1969). Despite this, the Court had repeatedly upheld restrictions on this right when issues of national security are implicated. *Haig*, 453 U.S. at 309. *C.f. Trop*, 356 U.S. at 101–02 (condemning revocations of nationality).

²²⁸ See Bennhold, *supra* note 214.

²²⁹ See Bowman, *supra* note 147.

²³⁰ See generally, for example, Afsheen J. Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT'L SECURITY L. & POL'Y 439 (2012); Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101 (2010); Saby Ghoshray, *Targeted Killing in International Law: Searching for Rights in the Shadow of 9/11*, 24 IND. INT'L & COMP. L. REV. 355 (2014).

²³¹ See, for example, CHRISTIAN ENEMARK, *ARMED DRONES AND THE ETHICS OF WAR: MILITARY VIRTUE IN A POST-HEROIC AGE* (2014); KENNETH R. HIMES, *DRONES AND THE ETHICS OF TARGETED KILLING* (2016); Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, 23 J. APPLIED PHIL. 323 (2006).

of vital consular services that might make a meaningful difference in navigating a foreign legal system.²³² He might also have difficulties traveling internationally if he does not hold another nationality and passport. If he is rendered stateless, he might be “stuck” in the country where he is located. Later, it would likely be difficult for that person to contest the revocation of his nationality.

In the U.K., for example, the individual has only twenty-eight days in which to appeal the revocation before a special immigration court.²³³ By the time he has notice of the revocation, starts gathering evidence for his defense, and arranges for legal representation, the period might expire. Moreover, lawmakers in the U.K., when debating the bill, voiced the concern that individuals who have had their nationality revoked would be greatly prejudiced when applying for a nationality from another state.²³⁴ Indeed, few States, if any, would permit the naturalization of a person who lost his prior nationality on account of being a suspected terrorist.²³⁵

States could instead monitor individuals who are suspected of terrorism in other ways. They might flag their passports at border checkpoints and detain suspects at points of entry. There are alternative means, including placing individuals on no-fly lists and closely monitoring or arresting suspects upon reentry. Denationalization might make it harder for the home state to eventually capture and hold accountable a suspected terrorist for these reasons. A suspected foreign fighter, having learned of his denationalization, might never attempt to return to his home state. Thus, States would simply be increasing the global incidence of statelessness without actually achieving any tangible security benefits.

D. Balancing the Factors

Given the mix of related policy and legal considerations for and against these proposals, States will have to weigh the security benefits of these programs against the potential consequences. There are clear tradeoffs—by limiting an individual’s opportunity to reenter the country through denationalization, the state is foregoing the opportunity to apprehend the suspect at a point of entry. While it might be easier from a legal standpoint to denationalize a suspected foreign fighter before a targeted killing, this might violate the state’s responsibilities under international law.

²³² Under the Vienna Convention on Consular Relations, States have the right to assist their nationals who are detained in other States. *See* Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Moreover, individuals have a right, under international law, to consular access. *Id.*

²³³ *See* Bennhold, *supra* note 214.

²³⁴ *Id.*

²³⁵ *Id.*

States should refrain from implementing these plans due to their implications on state security and international law. Denationalization plans do little in the way of furthering long-term security objectives and do not resolve the underlying problems associated with international terrorism. If anything, they allow a state to “wash its hands” of one of its nationals, thereby punting the issue to the States in which these individuals are operating. The consequences of these plans are also in conflict with the sovereignty of the receiving States and could conceivably lead to tensions in foreign relations and failure to follow other principles of international law. Denationalizations in furtherance of targeted killing programs are also of questionable legality under international law, and the usage of these plans might undermine state compliance with other areas of international law. Additionally, the risk of error and its high costs to individuals who are wrongfully stripped of their citizenship should warrant reconsideration of these plans.

Alternatives to denationalization plans, such as travel restrictions and revocation of passports, might achieve the same results and have fewer negative long-term consequences on state compliance with international human rights law. Therefore, this Comment concludes that States should not implement these plans, but instead focus on counterterrorism options that will do more to directly curb the actions of terrorist groups like ISIL and apprehend suspected members. Other solutions should also be carefully scrutinized for their implications on the abilities of States to faithfully execute their responsibilities under international law.

VI. CONCLUSION

This Comment examined some of the international treaty law concerning a right to nationality and its implications on plans by States to strip suspected ISIL foreign fighters of their nationality. It divided the inquiry into three parts: plans to denationalize dual citizens, plans to denationalize individuals with only one nationality, and plans to revoke the citizenship of known associates of suspected terrorists. The Comment concluded that while there is no outright ban on denationalizing dual nationals under international law, there is an “arbitrariness” safeguard in existing treaty law. While it is unclear whether this affords individuals any substantive rights, it does, at the very least, give suspects a right to challenge or contest a determination made about their citizenship. In the case of an individual with only one nationality, a state may revoke his citizenship and render him stateless only if an existing exception to the 1961 Convention has been met. There must be some opportunity to contest the revocation before an independent tribunal. In the case of individuals associated with a suspected ISIL foreign fighter such as family and friends, international law likely prohibits a revocation of these persons’ nationality unless there is an independent basis for revocation. Certain

international conventions afford special protection to the nationality rights of women and children.

At the same time, there are normative questions and related legal questions that States must answer before implementation. For example, does denationalizing a suspect force him back into a conflict and relieve the denationalizing state of its responsibility to apprehend a suspected terrorist? Do such plans facilitate targeted killing programs, and are such programs permissible under international law? The Comment argued that such plans do little in the way of furthering counter-terrorism policy objectives and allow States to effectively ignore the underlying problem and punt the issue to the international community. Moreover, States are disregarding their legal obligations, potentially under domestic and international law, to actively seek out and hold suspected foreign fighters accountable. Denationalization plans also hurt state compliance with international law, and the possibility of error in denationalizing is a very real risk with severe consequences. Given the questionable efficacy of these plans and their numerous negative ramifications on international law, States should refrain from implementing them.